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# **BREXIT**

## **THE LGBT IMPACT ASSESSMENT**

# LGBT RIGHTS

as Britain prepares to leave  
the European Union

## FOREWORD

Lord Cashman

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## NOTE ON LANGUAGE

In this report we use **LGBTI** to mean the whole LGBTQI+ community, in accordance with Gay Star News style. In the case of European rights and protections, it is often more accurate to refer to **LGBT** or to just **LGB**, so we have used those initialisms where appropriate.

 **GAYSTARNEWS**



Photo by David Dibert

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## FOREWORD

BY LORD CASHMAN

At times when either as individuals or as a nation we face great and unprecedented change, we need more certainty not less.

Reassurance is absolutely necessary if we are to embark upon a journey whose destination we do not know, and on a journey that needs to unite this divided country rather than imperil it.

Passionate words maybe, and I make no excuses for them. It is how I have argued in the defence of the Charter of Fundamental Rights of the EU during our debates in the House of Lords on our withdrawal from the European Union.

We have been told time and time again by the government, and some legal experts that we do not need the Charter, that it is unnecessary because the rights already exist in other domestic legislation and international conventions.

That is plainly untrue. But if that was the case, then why is it that this is the one piece of EU law this gov-

ernment refuses to carry forward after we leave the European Union? This government, which has consistently questioned judgements on human rights and questioned whether we need to be committed to international human rights obligations.

The Charter of Fundamental Rights is a stunning reaffirmation that rights will be protected against governments who would not otherwise give them, or wish to take them away. It is a Charter that has helped to progress human rights in other parts of the world too. It remains a powerful tool.

Again, as I said in the House of Lords, when it comes to human rights and civil liberties I want more guarantees, even repeats of those guarantees, not less.

The report you are about to read is a powerful reminder that if we do nothing, then we could potentially lose all. They have woven together the story of the evolution of the protection of rights, including LGBT rights, that might never have happened had it not been for persistence, vision and courage. A group of nations acting together to ensure that the past would never be repeated and that voiceless minorities, however unpopular, would be protected.

30 years ago I never believed that any government, not even a Conservative government in the United Kingdom would've brought forward a piece of legislation to further undermine and indeed stigmatise a community battling against AIDS and HIV. It happened. Section 28 happened. It was politically expedient and our Parliament passed it.

This should be our reminder that, in the landscape of human rights, we always need to guard against the unexpected. The Charter is one of our guardians, and this story is it's evolution.

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Michael Maurice Cashman, Baron Cashman, CBE is a British Labour politician and former actor. He was a co-founder of Stonewall. He was a Member of the European Parliament for the West Midlands constituency from 1999 until he stood down in 2014. He has since then been appointed to the House of Lords. On 23 September 2014, Cashman was appointed the Labour Party's special envoy on LGBT issues worldwide.

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## EDITOR'S FOREWORD

BY TRIS REID-SMITH

You may think it is inevitable, in the complexity of the Brexit negotiations, that the needs of minorities, including LGBTI people, will be overlooked.

We have certainly seen no evidence that the UK Government has paid any attention to LGBTI citizens in the Brexit process. And so, with this report, we take it on ourselves to assess the impact of Brexit on our community and to provide recommendations.

The UK Government's current view is that they can jettison the EU Charter of Fundamental Rights – the highest standard of protection for LGBTI people currently available in international law – as superfluous. That certainly indicates trouble may lie ahead.

If you think that your sexuality or gender identity has little to do with what you stand to lose in the Brexit process, this report may alarm you. It sets out that LGBT rights have been driven forward by our EU membership and are underwritten by it. And it argues that LGBT people are even more likely than others to use rights granted by the EU.

The UK Government has stated we will not lose LGBT

rights on the day we exit the EU. That is likely true, although this report shows we will lose benefits. Moreover, Europe will no longer drive the agenda on sexuality and gender identity rights in the UK, as it has for two decades.

Even more seriously, we will lose the EU's guarantees on the rights we have. LGBT Britons have frequently relied on those guarantees and there is no UK constitution to replace them. LGBT people in this country remember the spectre of Section 28. We know therefore, that an unfriendly future government can enshrine homophobia or transphobia in law. Our UK community is also well connected to LGBTIs in other parts of the world and has witnessed many examples of politicians reversing their rights with devastating consequences.

Britain has advanced in its overall attitudes to LGBTI people. But many of the senior UK politicians backing Brexit have openly homophobic and transphobic records. Trusting the future of the rights we have worked so hard to achieve to their goodwill seems to me to be reckless.

Immediately after the June 2016 Brexit vote, we saw that attitudes can rapidly change on the streets. In July, August and September of that year, hate crimes against LGBTI people rose 147%, measured against the same period in 2015.

As a community we can pretend this danger isn't looming. Or we can do what we have always done – take responsibility personally and collectively for the protection and promotion of our rights. I believe we are well-motivated to act. A straw poll carried out by Gay Star News just before the 2016 Brexit vote indicated that 77% of our readers wished to remain. More generally, polling since the referendum has seen a slow, but consistent, shift to scepticism about Brexit.

Brexiters have argued that pro-EU voices in the UK should silently accept the course they are now plotting for us. But it is an exercise in democracy to openly argue for the future we wish to see.

I am deeply indebted to the report's authors for taking on my commission pro-bono and for providing their unparalleled expertise on this subject. I hope their words will be read with care, and their warnings heeded, before it is too late.

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Tris Reid-Smith is a journalist, the founder and editor of Gay Star News. While studying psychology at Reading University he helped to edit the student newspaper. On graduating he spent a year travelling around the world, then worked at the Wokingham Times and Reading Evening Post. In 2000 he moved to London to work for the Pink Paper, becoming editor ten months later. In 2005 he arranged the sale of the Pink Paper to Millivres Prowler Group (MPG) and later became group editor-in-chief for MPG, in charge of GT and the group's other publications.

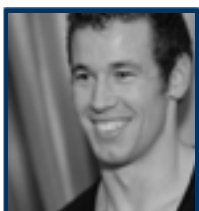
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# ABOUT THE AUTHORS



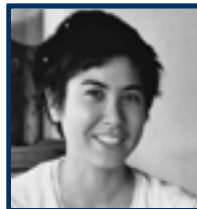
## JONATHAN COOPER

[Jonathan Cooper](#) is a barrister at Doughty Street Chambers, London and he is an internationally recognised human rights specialist. Jonathan was involved in a number of important LGBTI human rights cases, including the UK's gays in the armed forces case before the European Court of Human Rights, and cases establishing equal treatment rights for trans people across the EU. He has assisted LGBTI people in countries which criminalise homosexuality to bring legal challenges in Belize, Kenya, Uganda, Jamaica and Indonesia, among others. He has petitioned the UN, as well as the Inter-American system and worked within the African human rights framework. In 2007, the Queen awarded Jonathan an OBE for services to human rights.



## PETER DUNNE

Peter Dunne is a Lecturer in Law at the University of Bristol. His research interests lie in the areas of family law, European Union law and human rights. Peter's scholarship has a particular focus on gender, sexuality and law. Prior to entering academia, Peter worked as a human rights advocate in the United States and Europe.



## KEINA YOSHIDA

Keina Yoshida is a barrister specialising in the areas of inquests and public inquiries, court of protection, action against the police, and equality and non-discrimination law. She is passionate about women's human rights and LGBT rights and has acted in cases before the European Court of Human Rights, and other international adjudication bodies. She is part of the Doughty Street International team and sits as an Advisory Board Member of the Centre for Women, Peace and Security at the London School of Economics (LSE). She is a Visiting Lecturer at City University where she teaches a masters course on international human rights law and practice and also supervises students at the Gender Department at the LSE. She has a PhD in law and is part of the editorial board of Feminist Legal Studies. She publishes broadly on women's rights and in 2013 conducted research and authored the report Missing the Mark: LGBT Asylum Claims for UKLGIG.



## ANYA PALMER

Anya Palmer is a barrister at Old Square Chambers specialising in employment and discrimination law. Prior to being called to the bar in 1999, she worked for Stonewall from 1990 to 1998 campaigning for an equal age of consent, an end to the ban in the armed forces, and legislation against discrimination in the workplace.



# INTRODUCTION



Photo by Nataniel Vieira

A marvel of the 21st century has been the speed with which LGBTI equality has been fostered within the UK.

At the close of the 20th century, the only laws applicable to the lesbian and gay community penalised and stigmatised us. There were specific criminal laws that only targeted gay men. There was an unequal age of consent and the odious Section 28 censored any discussion of homosexuality in schools and blighted the lives of gay and lesbian people, particularly LGBTI youth.

No laws protected us. We could be fired or thrown out of our homes simply because our employers and/or landlords did not want queers in their workplace or in their properties. Infamously, in the mid-90s four members of the armed forces had the temerity to challenge the fact that they'd been fired because they were gay and lesbian. They lost that legal challenge. English law upheld their dismissal. The future was bleak.

Yet a decade later UK law recognised the equality of lesbian, gay and bisexual people. The law for transgender people was far from perfect but still ahead of that in most other countries. We would still need to make further progress in legislation and in society, but the principle of equality was firmly established.

And in 2016, when David Cameron resigned as Prime Minister, he heralded as one of his greatest successes the fact he had pushed through equal marriage, arguably his finest legacy. Yet this was the same David Cameron who as a new MP had voted to retain Section 28. The irony is not lost that it was a Conservative Prime Minister who introduced equal marriage and yet barely a decade earlier that party had fought tooth and nail

to keep LGBTI people marginalised and downtrodden.

Cameron adopts the language of Barack Obama. He recounts his story as that of a man who evolved on LGBTI rights. This is a dubious narrative. David Cameron is a good man. Of course, he was never homophobic, but when and why did it become politically expedient to promote LGBT rights?

The reality is that the UK's journey towards full equality for LGBT people could not have happened without what we now call the European Union (EU) and the European Court of Human Rights (ECHR). And so when we reflect on, and cherish, that marvel which is LGBT equality, we must begin our journey with the EU. Could Cameron have evolved without the measures adopted under the auspices of the EU which made LGBT rights vote winners? Tony Blair and Gordon Brown's governments are rightly credited for establishing LGBT equality, but could they have achieved what they did without the EU and regional guarantees of fundamental human rights?

In this report, we chart how the UK Government, European Union and the separate European Court of Human Rights have advanced LGBT rights, and how progress in this country has been dependent on our relationship with Europe, in particular the EU. In part two, we examine the rights LGBT Britain currently enjoys which Brexit may jeopardise, particularly in the areas of free movement, trans rights, employment rights, relationship rights, asylum and rights guaranteed by the EU Charter.





# **PART ONE**

# **HOW EUROPE HAS SHAPED BRITISH LGBT RIGHTS**

# ENDING SEXUAL ORIENTATION DISCRIMINATION

## AS A PRINCIPLE OF EU CITIZENSHIP

We can pinpoint the date when the transformation in relation to gay and lesbian equality took place. The Amsterdam Treaty was signed on 2 October 1997. That treaty, which streamlined the EU and prepared it for the 21st century, created new competences for the European Union. It also [consigned sexual orientation discrimination in the EU to the dustbin](#) of history. Article 13 of that treaty put beyond doubt the fact that discrimination is incompatible with the single market:

‘Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.’

And the rest, as they say, is history.

Equality for transgender people developed in tandem with ending sexual orientation discrimination, although, as will be developed below, the trans equality journey followed a different, albeit less smooth, path.

As well as providing the basis for LGBT equality in the UK, the drafting of Article 13 is also a perfect example of the democratic workings of the EU. The Council and Member States had shown little or no interest in sexual orientation and/or gender identity until this point. And until the late 1980s and the early 90s, the Commission fell in line with that position. But things began to change and there was a growing recognition that for the European Single Market to function effectively, it needed to be discrimination free. In 1991 the Commission requested that the European Human Rights Foundation to undertake a comprehensive study on the situation of lesbians and gay men and, [Homosexuality: a European Community Issue](#) was published. Although the language used in the report might seem outdated by today's standards, it importantly made it clear that discrimination against gay, lesbian and bisexual people was clearly at odds with the ideals of the Single Market.

Many MEPs had always been concerned by LGBT discrimination. Since the first directly elected European Parliament in 1979, groupings of MEPs consistently argued for the protection of gay and lesbian people and Europe's commitment to free movement enabled them to do this. And with free movement came the competence of the European institutions. At the same time, NGOs such as the International Lesbian and Gay Association (ILGA) and Égalité began to lobby the European institutions, particularly the Parliament. This three way dynamic between the Commission, the Parliament and civil society is an exemplar of democracy in action within the context of the Single Market. MEPs carefully, but doggedly, created an unimpeachable position whereby the EU had to act to protect against LGBT discrimination. Initial attempts to put sexual orientation on the agenda, such as the Squarcialupi Report in 1984, had mixed success. It was a document before its time and nothing tangible came from it, but by 1994 the Roth Report was adopted by the Parliament and it was to form the basis of what became Article 13 of the Amsterdam Treaty.

MEPs were then able to use their role in the Amsterdam process to ensure that Article 13 contained a prohibition on discrimination, including on grounds of sexual orientation. It was a masterclass in MEPs and civil society working together. And in the end the Council had no choice but to accept the inclusion of sexual orientation within Article 13 and with that the competence of the EU to end sexual orientation discrimination was beyond doubt.

Other forces also aligned to ensure that the Amsterdam Treaty would include protection for gay men and lesbians. The treaty was negotiated during the presidencies of the Italians, Dutch and Irish, all of whom had centre left and/or liberal leaning governments. Mary Robinson was President of Ireland and Romano Prodi was Italy's Prime Minister. The Irish government had been particularly active in the process of ensuring sexual orientation was in the treaty from the outset. As holder of the Council presidency in the second half of 1996, Ireland proposed the original version of what would become [Article 13](#).

But at the time, only five countries in the EU had measures protecting against discrimination on the basis of sexual orientation: the Netherlands, France, Ireland, Spain and Finland. This makes the inclusion of sexual orientation within Article 13 even more remarkable, but the Irish were particularly committed to the provision and for the Dutch it seemed obvious.

## UK GOVERNMENT TRANSITIONS

### FROM OPPOSING EQUALITY TO WELCOMING IT

Meanwhile, UK Prime Minister John Major's Conservative Government (1990-1997) had been clear that they would not support Article 13 in the form it was adopted. But Major was replaced by Tony Blair's New Labour government at the general election in May 1997. So when the time came to agreeing the final text, in mid 1997, Major's Britain had been transformed by Blair's optimism. These were the heady early days of Prime Minister Blair's administration. New Labour had won a landslide election victory on a promise of rejecting all unjustified discrimination (widely seen as a euphemism for ending LGBT discrimination). And Blair's Europe Minister, Doug Henderson, was committed to building human rights into the EU project.

These were early moments in the genesis of LGBT rights. The culture of Section 28 still pervaded across the UK. Technically this law prevented local authorities from 'promoting' homosexuality. Its effects were insidious and wide-spread, but most notably, it was used to shut down any discussion of LGBTI issues in schools. Homosexuality was legal across the UK but with an unequal age of consent, by this point 18 for gay sexual activity, 16 for heterosexual sex.

Against this backdrop, the New Labour Government took small and tentative steps in relation to LGBT rights. And luckily for New Labour, their work had been done for them. By the time the text of the Amsterdam Treaty was finalised in June 1997, protection from discrimination on the grounds of sexual orientation was firmly enshrined in Article 13. Had the Conservatives remained in power, it would not have survived, but New Labour was very happy to go along with the new consensus. The genius of Article 13 is that it was permissive. It

didn't mandate ending LGBT discrimination within EU law. 'Should' had been replaced with 'may'. Expectations were low, but the zeal of the Commission with the support of the Council, and the EU's new-found competence, should not have been underestimated. The Amsterdam Treaty entered into force on 1 May 1999. If there's ever a reason to doubt the marking of May Day, Article 13 becoming binding EU law proves why we should celebrate working people on that day. Having previously guaranteed protections for women in the workplace, the Employment Equality Framework Directive quickly followed and became law in December 2000. Its purpose: to combat discrimination on grounds of disability, sexual orientation, religion or belief and age in the workplace.

## THE UK FOLLOWS THE EU

### AND PUTS EQUALITY INTO PRACTICE

The UK had followed the EU's lead and implemented Article 13. It subsequently gave effect to the EU's Employment Equality Framework Directive. As such, the Labour Government had put themselves in a position to do the right thing, while providing political cover for doing so by being able to tell any critics that the rules came from Europe. Implementing Europe's Directive required a complex domestic legal framework and the government took the maximum time allowed to draft it and to give employers and lawyers time to adjust to it. So the UK finally made the Employment Equality (Sexual Orientation) Regulations 2003 law on 1 December 2003. And with that, thanks to the EU and the new UK Government's aspiration for equality, for the first-time, laws protected LGBT people at work.

It is now the Equality Act 2010 that gives effect to that Directive. Attempts to widen the protection of EU law in relation to LGBT discrimination to cover goods and services as well as employment have stalled for the time being, but as the UK chose to build in that protection for LGBT people into the Equality Act 2010, this frustrating technicality in relation to EU law (luckily) does not affect LGBT people in the UK.

The story of Article 13 and how the EU came to protect LGBT people from discrimination is a fascinating one. Another reason for including sexual orientation within

the Amsterdam Treaty was the anticipation that new member states from Eastern Europe would soon join; and prohibiting LGBT discrimination was not to become negotiable.

For those who challenge the EU's democratic credentials, the EU's own relationship with LGBT rights suggests its detractors are wrong. A key principle of democracy is how democratic societies protect vulnerable minorities who cannot get their voice heard. All the facets of the EU worked together to enshrine LGBT rights. Some of those involved stand out more than others. As we discussed earlier Ireland is an example of a country who drove the progressive agenda forward. Equally, MEPs built the case for LGBT equality within the Single Market. Key activists also played their part. None more so than Peter Ashman whose legacy lives on well beyond his untimely death. It was Peter who ensured that the Report, *Homosexuality: A European Community Issue* was published. It was Peter who articulated those links between free movement and sexual orientation discrimination. It was Peter who, as the director of the European Human Rights Foundation, ensured that organisations like ILGA were adequately funded. We in the LGBT communities in the UK and across the EU owe him so much.

## THE EUROPEAN COURT OF HUMAN RIGHTS

### TAKES THE EU LEAD

An unanticipated consequence of the EU's embrace of LGBT rights was that it appears to have motivated that other European institution, the Council of Europe and its European Court of Human Rights in Strasbourg, to raise the stakes where LGBT rights were concerned. The Council of Europe is, of course, separate to the EU and, in one sense bigger, with 47 member states covering 820 million people, compared to the EU's 28 states and 510 million population. However, one clearly influences the other. It is no coincidence that the European Court of Human Rights widened its approach to the protection of LGBT people only after 1997 and the adoption of the Amsterdam Treaty. Prior to 1997 the Strasbourg Court had limited its protection of gay and lesbian human rights issues to decriminalisation of homosexuality. This included the equal age of consent, in the context

of the UK.

The limited way in which the European Convention on Human Rights was used to uphold the rights of LGBT people caused one of the authors of this Report to write, exasperated, in 1996 that perhaps it should be renamed as the European Convention on Heterosexual People's Rights. However, once the Amsterdam Treaty was in force, the Strasbourg Court upped its game and upholding the human rights of LGBT people became the norm, whereas prior to 1999 it had been the exception. The Amsterdam Treaty demonstrates that times had changed, and that it was no longer acceptable for institutions to marginalise LGBT people and refuse to guarantee their fundamental human rights.

## EUROPE, WESTMINSTER AND WHITEHALL

### DRIVE CHANGE TOGETHER

We can't know whether the Labour Governments under Tony Blair and his successor Gordon Brown would have gone out of their way to protect LGBT people without the cover of EU law. It is clear that Europe set an agenda, informed by its member states, and the democratically elected New Labour government in Westminster and Whitehall followed that lead. Blair prioritised dismantling historic abuses, such as getting rid of Section 28. He clearly wanted to establish an equal age of consent for homosexual and heterosexual activity at 16; which ultimately came about following a decision by ECHR holding the UK in violation of the Convention on the subject of the unequal age of consent. European human rights law therefore required the government to end the disparity.

When it came to the ban on gay men and lesbians serving in the UK armed forces, this was again mandated by the ECHR. And, in fact, the UK Government fought the issue in the Strasbourg court.

It was also Strasbourg that demanded that the UK get rid of offences that only gay men can commit. The particular example of this was the offence of 'gross indecency' which could only be committed by consenting men. That offence was committed if more than two men were involved. In *ADT v UK*, the European Court



of Human Rights held that offence violated the right to respect for private life. Virtually all major changes in relation to LGBT rights have their source in one or both European institution, either the EU or the European Court.

There were attempts to litigate in relation to sexual orientation discrimination at the EU level before the Amsterdam Treaty, but these had been unsuccessful (for example, [Grant v SW Trains](#)). This failure in relation to sexual orientation must be contrasted with the trans experience. The rights of trans people were driven by the Court of Justice of the EU. In 1996 they upheld the rights of a trans woman who was discriminated against at work ([P v S & Cornwall County Council](#)) – she was treated abysmally. They called it what it was – sex discrimination – and thus transformed the lives of trans people across the EU. This case laid one of the main foundations for transforming the lives of trans people over the next two decades. The implications have been slow to materialise but it did mean that when a cis woman discovered her trans male partner could not benefit from her NHS pension, she took a case to the Court of Justice of the EU and successfully established that this was also sex discrimination ([KB v NHS Pension Agency](#)).

The UK may have allowed gender reassignment surgery but before the EU court intervened, the UK was hopeless in upholding trans people's rights. Even the European Court of Human Rights had been slow in holding the UK to account for keeping trans people in a legal purgatory, until, finally, in 2002, that Court got around to upholding the rights of trans people ([Goodwin v UK](#)). And since then, the UK has actively sought to ensure the rights of trans people under all circumstances are protected.

None of these changes would have happened without European institutions and the EU in particular. It has been the EU that has been the driving force behind LGBT equality. Without the EU's commitment to our equality, would the UK Government have heard our voices?

Civil partnerships and then equal marriage suggest they might have, but without the EU, would the stage have been set? It is also fair to say that, while not directed by the EU, the movement for marriage equality in Britain was inspired and emboldened by the leadership of EU and Single Market peers who had already legislated for same-sex marriage. The Netherlands, Belgium, Spain, Norway, Sweden, Iceland and France all implemented marriage equality before England, Wales and Scotland. Campaigners in the UK certainly cited these examples in arguing for marriage equality, suggesting Britain needed to keep pace with our European part-

ners. If we leave the EU, we can only assume this relationship with other countries in advancing LGBTI rights will be weakened.

Once required to, Blair's and Brown's Governments dismantled LGBT inequality with gusto and Cameron's coalition Government put the icing on the cake with equal marriage in England and Wales. Scotland implemented same-sex marriage shortly after. Sadly marriage equality has been blocked in Northern Ireland, despite polling showing a clear support favour it. And so, the UK has gone beyond what has been required by EU law, but without that impetus, and also the recognition that LGBT equality is a vote winner, would our politicians of their own volition fought for our rights?

## THE EU CHARTER OF FUNDAMENTAL RIGHTS

### RAISES LEVELS OF PROTECTION

By the late 90s it was clear that human rights protection within the EU was too diffuse. It was therefore decided that the human rights that people within the EU should be able to take for granted should be set out in one document, and the EU Charter of Fundamental Rights was conceived. The UK was actively involved in the drafting process. That document was adopted in 2000 and it became legally binding in 2009 across the EU. It was drafted with the expectation that it would be legally enforceable.

The Charter is a remarkable statement of 21st century human rights guarantees. It is the only legally binding international human rights document that expressly protects against discrimination on the ground of sexual orientation. As such it makes clear that discrimination against gay men, lesbians and bisexuals violates human rights law.

The express protection of lesbian, gay and bisexual people in the Charter was a pivotal moment in global LGB rights since none of the UN human rights treaties contained this express protection. The human rights of LGB people could no longer be ignored. As human beings we had the same rights as everyone else, but on top of that, the Charter recognised we needed specific

guarantees against discrimination.

Should the Charter have provided greater protection for trans people and those who do not conform to the more traditional gender constructs? Protection from discrimination on the basis of gender identity was not included, but as EU law is clear that trans people are protected on the ground of sex, is additional protection required? Might express reference to gender identity have diluted the protection provided for by the prohibition on sex discrimination? Alternatively, does the omission of gender identity as a prohibited ground of discrimination leave trans people and those who are gender-fluid vulnerable? As our understanding of the issues around gender identity grows, we may be able to provide the answers.

Article 21(1) of the EU Charter is worded as follows:

'Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.'

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## CEMENTING LGBT RIGHTS

### IN LAW

With the adoption of the Charter of Fundamental Rights, LGBT people in the EU secured their rights. Wherever EU law is engaged the Charter applies and, therefore, across the reach of all EU law, from asylum policy to health and safety, there can be no discrimination based on sexual orientation or sex.

Without question, the Charter represents a high point of LGBT human rights protection in international law to date. Would the Charter have included the prohibition of discrimination on the ground of sexual orientation without the inclusion of Article 13 in the Amsterdam Treaty back in 1997? The Council of Europe's European Convention forbids discrimination in relation to the enjoyment of the rights in the Convention, but the ECHR provision protecting against discrimination, [Article 14, does not mention sexual orientation](#). In fact, it gives protection to LGBTs, as 'other status' has consistently been interpreted as including sexual orientation. LGBT people have also been protected by the rights in the ECHR, most notably privacy rights. In the absence of Article 13 of the Amsterdam Treaty, would the drafters have felt sufficiently emboldened to include protection against sexual orientation discrimination in the Charter? Would the ECHR have been enough of a basis for them to do that? It is unlikely. Because those MEPs had already done the groundwork, backed up by LGBT activists, most notably ILGA Europe at this stage, including sexual orientation in the Charter was straightforward, and at the time the Charter was drafted back in 2000, this issue was not controversial for most member states and certainly not the UK.

Across the EU, LGBT communities are especially fortunate to have the protection of the Charter. In those countries that are less enlightened, LGBT people have access to this fundamental safeguard. In the UK, the Charter provides belt and braces protection. Gordon Brown's Equality Act offers wide-ranging safeguards which go further in places than existing EU laws, but the Equality Act is not the same as the Charter. The Charter is the highest level of law within the EU. So if a member state is discriminating against LGBT people in the context of the rules of the EU, the prohibition on discrimination will trump and the Charter will protect those LGBT people from any discriminatory laws. Later in this report, we will show how the Charter has been used to protect the free movement rights of a married gay couple, one who is an EU citizen and the other not.

The LGBT communities in the UK are indebted to the EU for providing the basis for the equality we now enjoy. LGBTs in the UK had previously seen how governments can enact draconian legislation against them. If we remained a member of the EU, our membership would be an effective block on such moves. For example, a combination of EU anti-discrimination law and the EU Charter could not have countenanced Section 28. Yet at the time, LGBT people in the UK were powerless against the cruelty of those laws. Our fate was left to the political whims of Parliament.

# DOES EUROPE'S INABILITY TO PREVENT ALL ABUSES

## UNDERMINE ITS SIGNIFICANCE?

Critics of the EU may point to member states which have failed to achieve the level of LGBTI inclusion we have in the UK, and thereby suggest EU membership is not the boon we hold it to be. It is worth examining that argument to identify what the EU has, in fact, done and what it is ill placed to do.

When we think about LGBTI rights in Europe, we often focus on specific marquee rights, such as 'marriage equality' or 'gender recognition'. Some may point out the EU has never required member states to provide marriage equality or gender recognition and thereby suggest LGBTI people have little to lose from Brexit.

It is true the EU does not require gender recognition or equal marriage – both form part of national family law systems, which by and large fall outside the scope of EU law. However, as this report shows, EU law does cover a broad range of topics, including employment protection, asylum, and free movement.

The media tends to focus on the negative lived-experience of LGBTI citizens in EU countries, such as Hungary and Poland. But the rights we set out in this report (with notable exceptions where the UK has gone further than the EU) all equally apply to all LGBTI EU citizens, either because they have been incorporated into national law or because (where Member States do not incorporate rights) the rights are directly effective in the member state. When it comes to questions of sexual orientation and gender identity, this means LGBTI citizens have access to EU law to defend their rights, even when the government in their country fails them or acts against them.

It's also important to note that candidate countries to join the European Union have to radically change their legal system to ensure their sexual orientation and gender identity rights are up to standard. The fact there is a standard legal framework of LGBT protections across Europe means that discrimination is less likely to place – both because it is censured and because those laws have fostered a culture of openness. Just as UK LGBT

citizens stand to lose from Brexit, the fact that the EU is losing a broadly LGBT-supportive member from its ranks could, in the long-term, harm progress on advancing rights across Europe. And the most vulnerable LGBT Europeans are most likely to feel any such loss of positive influence most keenly.

On the other hand, it is also true that some of the more sinister abuses of LGBTI rights, such as banning public marches, may not fall within the scope of EU law, and therefore EU is comparatively ill-placed to respond. However, the fact that EU law does not solve all problems does not distract from the indisputable fact that it has meaningfully enhanced LGBT rights in countries. And, indeed, the EU (including the Commission, Parliament and Council) have responded to curbs on LGBT rights in Eastern Europe, and have placed institutional pressure on various governments.





## **PART TWO**

**WHAT WILL  
LEAVING  
THE EU  
MEAN FOR  
BRITISH LGBTI  
PEOPLE?**

## IS BRITISH LAW SUFFICIENT

### TO PROTECT US?

And now we are leaving the EU. Will that mean a return to the bad old days where our rights become a political football? It shouldn't, because we now have the Human Rights Act and the culture of rights which it has fostered. And we also have the Equality Act. Additionally, most EU law is being retained post Brexit. However, the Government's proposal is that the EU Charter of Fundamental Rights is to be jettisoned and will not remain part of UK law post Brexit.

Losing the Charter does matter because with it goes our belt and braces in relation to human rights protection. We are also removing from the UK's jurisdiction the only international binding legal instrument that expressly prohibits discrimination on the grounds of sexual orientation in the text of the document. That is counter-intuitive. Were those who voted to leave the EU voting to take away LGBT rights without replacing those rights with something equal or better? It is unlikely that was their intent.

And are the Human Rights Act and the Equality Act sufficient to protect LGBT rights in the absence of hard-edged EU human rights protection? The Government have proposed that EU human rights principles should remain post Brexit, that the principles will linger somehow in the ether, but these are not to be enforceable. It won't be possible to bring a case on the basis that they've been violated. LGBT pension discrimination, for example, was only finally outlawed in the UK because [Mr Walker brought a case](#) and won on the grounds that his limited access to pension rights as a gay man violated EU principles. EU principles and the EU Charter are indistinguishable and it is disingenuous to suggest otherwise. And as Mr Walker's case proves and the Charter cases that will be discussed in the next section show, in the absence of clearly enforceable human rights, LGBT people are vulnerable to egregious forms of discrimination.

## WHY SHOULD OUR COMMUNITY FEAR

### RIGHTS MAY BE UNDERMINED?

In the absence of constitutional human rights protection in the UK, LGBT people will also be potentially at risk. The reality is that the Equality Act can be amended by a simple Act of Parliament and the current Government has consistently made clear that the Human Rights Act is up for grabs. Even the UK's continued commitment to the European Convention of Human Rights is not guaranteed. When human rights are treated in such a cavalier manner, should the LGBT communities in the UK be concerned by the loss of the Charter? Lessons from history and our own experiences show us that obstacles to taking away rights should be encouraged. LGBT people need greater rights protections, not fewer. As our voice can be lost amongst multiple competing domestic interests, we are safer within international organisations where our numbers are magnified and where also multiple courts are watching our backs. Our security was guaranteed when we could rely on a combination of courts, the UK's, the EU's and the European Court of Human Rights. Indeed, it took a case before the ECHR in order to decriminalise homosexuality in Northern Ireland in 1982.

As Parliament has historically legislated against us and has often required incentives from Europe to legislate to protect us, should we be concerned that we are leaving the EU and that our Government is expressing ambivalence towards the Council of Europe and its European Convention? Comments from senior Conservatives and members of the Cabinet suggest we should anticipate trouble ahead. It must be recalled that Iain Duncan Smith famously declared that a [Conservative Government would reinstate](#) the blanket ban on gay men and lesbians serving in the armed forces if requested by the MoD. So much for his respect for the rule of law and his commitment to human rights. And [Chris Grayling has made his thoughts very clear](#) in relation to bed and breakfast owners being required to accommodate gay men. They shouldn't have to if that offends their beliefs.

Is the Human Rights Act (and the ECHR) sufficiently robust to challenge such developments if they were to occur? The Equality Act would be powerless in the face of such amendments passed through Parliament despite the inevitable indignation expressed by the Equality and Human Rights Commission.

In this light, the loss of the EU Charter from UK law post Brexit is significant. That stark, unapologetic commitment to non-discrimination in Article 21 will be missed. It may be that Grayling and Duncan Smith have also 'evolved' and that there is no risk that LGBT equality could ever be questioned again, but we all know that is improbable. And, of course, there are technical legal arguments relating to the prospective scenarios identified above. But what is not in dispute is that the LGBT community remain vulnerable and therefore it is shocking that the Government could consider taking away the only directly binding international document that expressly protects us without replacing it with something equally as good or better.

## BREXIT HAS EVEN GREATER CONSEQUENCES

### FOR LGBT PEOPLE

Will LGBT people be disproportionately affected by the UK leaving the EU? The loss of the Charter will affect everyone, but as LGBT people have no other express anti-discrimination protection, it will inevitably have more consequences for LGBT people. Leaving the EU will also affect everyone, but because of the nature of LGBT identity it may have a bigger impact on LGBT people. LGBT people are a small part of any community and therefore by becoming part of a bigger entity such as the EU, the numbers of LGBT people connected with the UK have inevitably increased. And because the UK has provided enhanced rights for LGBT people, this has also attracted more LGBT people to the UK.

To play up to stereotypes and to make sweeping generalisations, we LGBT people tend to be less parochial and more internationalist in our outlook. We look for communities beyond those that we were traditionally raised in. By and large, we celebrate difference and diversity. The opportunities of being part of a European Union – a community of neighbouring nations where we all share more than citizenship – made up of over 500 million people are obvious to us and we have a clearer critique of the UK's culture and traditions. We have our own distinct take when we look back through our rose-tinted glasses at Britain's historic role in tormenting LGBT people. We continue to understand the need

for international solidarity with LGBTI communities in countries where rights are not protected and guaranteed.

## EU MEMBERSHIP ADVANTAGES

### THAT LGBT PEOPLE STAND TO LOSE

LGBT people are likely to take advantage of most if not all the benefits that come with EU citizenship, whether that's having a partner from another EU country or living in another EU country with a partner from outside the EU. The loss of freedom of movement rights will be a huge shock to LGBT people currently in the UK. And so will giving up on the legal basis for our equality.

Once the UK embraced LGBT equality, the UK within the EU has also played a pivotal role in fostering wide-ranging principles of LGBT equality across the Union. Those LGBT people in EU countries which only begrudgingly provide the minimum of equality mandated by the EU, will feel the UK's absence. Their chances of enhanced equality will be reduced accordingly.

The UK is now a key player in establishing LGBT rights globally. The EU is a huge global actor. The UK will miss the opportunities provided for by the European External Action Service in ending LGBT persecution. Were we to stay within the EU, we could have used our influence to prioritise LGBT rights internationally, including in relation to trade negotiations. Now that voice will be less distinct. The UK Government will have other priorities.

The following analysis focuses in depth on how LGBT people will be affected by Brexit, but of course the reasoning applies to everyone. We will all lose so much. This analysis has been consciously selective. We look at six issues in some depth from the perspective of LGBT people: free movement, trans rights, employment rights, relationship rights, asylum, and rights under the charter.

There will be many other advantages to EU membership that are not covered here. What is more, this analysis focuses on LGBT people living in the UK. It does not consider the future of UK LGBT citizens living in the EU after Brexit is finalised.

## FREE MOVEMENT

As noted, one of the most striking aspects of the European Union is the right which EU law confers upon all European citizens (including, until 31 March 2019, UK nationals) to [travel and work](#) freely across the 28 member states. In its core treaty documents ([Article 21\(1\) of the Treaty on the Functioning of the European Union](#)), the EU guarantees that '[e]very citizen...shall have the right to move and reside freely within the territory of the Member States' subject to specified limitations.

While the question of migration and free movement proved to be a particularly divisive (and misunderstood) element of the Brexit debate, the EU's free movement policies represent one of the most successful social and legal experiments of the past 70 years. Encouraging the cross-border flow of cultures and traditions, free movement has not only facilitated necessary emigration for many British LGBT persons (who, particularly in the 1970s and 1980s, experienced virulent queerphobia), it has also attracted new ideas and alternative opinions, which have helped to shape a new climate of openness and tolerance in the UK.

Free movement guarantees have an important impact on British LGBT persons who, when they move to another member state for work, want assurances that they can travel with their spouse or civil partner – particularly if the latter is not a European Union citizen. Indeed, the work/travel consequences of leaving the EU is a matter about which LGBT Britons should have especial concern.

European Union work/travel rights are governed by a large body of primary and secondary EU legislation. However, in the context of LGBT families, the [Citizenship Directive](#) (Directive 2004/38), which was adopted in 2004, is particularly significant. [Article 7](#) of the Directive permits (among other things) EU citizens to reside (for more than three months) in any member state so long as: (a) they are workers or are self-employed; or (b) have sufficient resources to avoid burdening the social welfare system and have comprehensive sickness insurance.

The right to reside (set out in Article 7) includes 'family member[s]' who are, and are not, nationals of another European Union country. For example, where a UK citizen, Julie, moves to Barcelona for employment,

she will (as long as she satisfies the worker/resources requirements) be able to bring her 'family member[s]', irrespective of whether those latter are from Britain or from a jurisdiction outside the EU, such as Australia or Jamaica.

For same-sex couples, what is particularly striking is the LGBT-inclusive way in which EU institutions have defined (and continue to interpret) the notion of family members for the purposes of free movement. In establishing the scope of 'family member' within the Citizenship Directive, Article [2\(2\)\(b\)](#) includes: 'the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage.' Thus, if a UK citizen, John, who is in a civil partnership with an American citizen, David, moves to Milan for work, EU law will allow David to also reside in Milan (Article 7(2)) as long as Italy treats its new Civil Union Law 2016 as equivalent to marriage. Once the United Kingdom leaves the European Union, John and David (and countless same-sex couples like them) will lose these travel/work safeguards, and will be subject to an as yet unknown (and possibly more disadvantageous) regime.

However, the potential free movement losses for British LGBT couples may actually be even more momentous than is currently thought. At the very moment when the United Kingdom withdraws from the European project, EU courts appear ready to radically expand cross-border protections for same-sex couples.

In addition to protecting same-sex registered partners who travel to another EU member state (as long as the host country recognises civil unions), the Citizenship Directive also includes spouses within the definition of 'family member' (Article [2\(a\)\(a\)](#)). Furthermore, in Article [3\(2\)\(b\)](#), the directive obliges member states, 'in accordance with [their] national legislation' to facilitate 'entry and residence for...the partner with whom the Union citizen has a durable relationship, duly attested.'

In a recent, landmark opinion ([Coman v Inspectoratul General pentru Imigrări](#)), Advocate General Wathelet has recommended that, for the purposes of Article 2(2) (a), a 'spouse' must include 'a national of a third State of the same sex as the citizen of the European Union to whom he or she is married.' Similarly, the Advocate General has also suggested that member states should not be able to refuse residence to partners in a durable relationship 'based on the sexual orientation of the person concerned.'

If adopted by the European Court of Justice, [Advocate](#)



[General Wathelet](#)'s recommendations have the potential to radically reform EU same-sex free movement rights. Such a judgment from the Luxembourg Court would – as much as any other legal rule – highlight what UK LGBT persons (and their partners) are losing through the Brexit process.

Returning to an example from above, the Advocate General's analysis would mean that, where John, the UK national, and David, the American national, marry in the United Kingdom, David would be entitled to accompany John to Italy, irrespective of whether the Italian state acknowledges same-gender marriage. Although Article 2(2)(b) of the Citizenship Directive only requires Italy to welcome David (as a civil partner) if Italian law also accepts civil unions as equivalent to marriage, Advocate General Wathelet's opinion would mean that – where John and David have lawfully married in the UK – they fall within the definition of 'spouse' for the purposes of the right to reside even though Italy does not yet permit same-sex marriage.

This will have particular significance if John's employers require him to move to an EU country, such as Lithuania, where there is currently no same-sex relationship recognition – marriage or civil partnership. In such a scenario, there would obviously be no obligation on Lithuania to allow David to reside as a civil partner, as the Lithuanian state does not also recognise civil partnership as an institution equivalent to marriage. However, John and David would still be able to move together because, David – as John's spouse within the meaning of the Citizenship Directive – has an acknowledged right to reside. Leaving the European Union, UK LGBT individuals will be deprived of the benefit of this potentially transformative enhancement of same-sex free movement guarantees.

## TRANSGENDER RIGHTS

The earlier sections of this report have already noted how the European Union (and, in particular, EU equality law) has played an important role in advancing transgender rights in the United Kingdom. In the landmark case (mentioned above) from 1996, [P v S](#)

[S and Cornwall County Council](#), a transgender woman claimed that she had been unlawfully dismissed by her employer (a local authority) because of her gender identity. The UK employment tribunal was uncertain whether the county council's actions – if the allegations could be proven – qualified as impermissible discrimination. At the time, UK domestic law did not explicitly prohibit employers from terminating the contracts of workers who expressed a transgender identity. Seeking clarity, the UK judges asked the European Court of Justice for guidance – specifically whether, under EU law, firing an employee because she undertakes, or proposes to undertake, a process of 'gender reassignment' amounts to sex discrimination.

The [Luxembourg judges](#) responded in the affirmative, observing that sex discrimination within the scope of EU employment law ([Directive 76/207](#), now replaced by [Directive 2006/54](#)) includes 'discrimination arising...from the gender reassignment of the person concerned.' If an employer mistreats or fires their worker because that worker undertakes a process of gender reassignment, the employer's conduct is 'based, essentially if not exclusively, on...sex.' Just as one cannot discriminate against a cisgender female employee because of her sex, so too employers should also not disfavour or fire transgender individuals because they transition.

In subsequent years, both the European Court of Justice and the EU legislature has built upon the rights set out in *P v S*.

In [Richards v Secretary for State for Work and Pensions](#), a transgender woman, who had undertaken a process of gender reassignment, was denied a pension at the age of 60 years because, prior to the [Gender Recognition Act 2004](#), the UK refused to legally acknowledge her female gender. The ECJ stated that withholding the correct pension from Ms Richards, who had done everything she could to affirm her identity, constituted unlawful sex discrimination. Similarly, in [KB v NHS Pensions Agency](#), the Luxembourg judges stated that [Article 157 TFEU](#) (formerly Article 141 EC), which relates to equal pay between men and women, precludes laws which prevented a transgender man from marrying his female partner and benefiting from that partner's employment remuneration. In terms of EU legislation, there is explicit affirmation that the '[principle of equal treatment for men and women...also applies to discrimination arising from the gender reassignment of a person.](#)'

*P v S* was a hugely significant moment – for all LGBT persons in the United Kingdom, but particularly for transgender communities. The decision made clear that, irrespective of whether Parliament was independently

willing to protect workers who undertake a process of gender reassignment (something it was clearly unwilling to do in 1996), transgender employees could still rely upon EU employment guarantees – guarantees that are (until Brexit) directly enforceable in the United Kingdom.

The judgment in *P v S* (and the subsequent case law and legislation) has forced the hand of consecutive UK governments to affirm and protect transgender rights. During a period of time where the European Court of Human Rights [continued to legitimise](#) the absence of gender recognition laws in the United Kingdom, it was *PvS* which required the [Sex Discrimination \(Gender Re-assignment\) Regulations 1999](#). The 1999 Regulations introduced legal equality guarantees for transgender employees, and paved the way for the current stand-alone protection of ‘gender reassignment’ in [Section 7 of the Equality Act 2010](#).

Understanding the origins of Section 7 (and the residual scrutiny which the EU has continued to exercise in recent decades) is important to fully appreciate the potential consequences of leaving the European Union. Post-referendum, many observers have rejected suggestions that Brexit will substantially impact transgender rights in this country. Their argument is that, with the Equality Act 2010, transgender populations (including transgender workers) have all the protections that they need. Yet, such assertions ignore the fact that EU law is the justification for including transgender identities within our current equality framework. Although Parliament may choose to enact legal guarantees which extend beyond the minimum floor of EU protections, law-makers cannot – while we are still members of the Union – violate certain core, baseline guarantees.

When the United Kingdom leaves the European Union, Section 7 of the Equality Act (the legacy of EU membership) will still be in place. There will, however, be no impediment to future parliaments successively chipping away at Section 7 rights. And, while no serious commentator expects MPs to immediately launch a wholesale assault on existing transgender protections (certainly not within the lifetime of this Parliament), it is – [especially within the current political climate surrounding single-gender spaces](#) – more than foreseeable that, freed from the constraints of EU scrutiny, future legislators could (in perhaps small but significant ways) reduce transgender non-discrimination rights. For those observers who believe that the European Convention on Human Rights can provide an adequate, substitute protection (if needed), the Strasbourg judges [have rarely addressed transgender rights through the lens of non-discrimination](#) (Article 14 ECHR) and, when they

have done so, the results have been (at best) mixed ([Pv Spain](#), [Hamalainen v Finland](#)).

## SEXUAL ORIENTATION

### EMPLOYMENT RIGHTS

The same reasoning – set out in the preceding section – applies to existing employment protections on the basis of sexual orientation. [EU Directive 2000/78](#) (known as the ‘Framework Equality Directive’) establishes a broad framework for prohibiting workplace discrimination against gay, lesbian and bisexual employees. As has already been discussed, Directive 2000/78 was the product of a landmark decision, enshrined in Article 13 of the [Treaty of Amsterdam](#) and opposed by John Major’s government, to include combatting sexual orientation discrimination within the competences of the European Union. This commitment to safeguarding against sexual orientation has now been reaffirmed in [Articles 10 and 19 TFEU](#), and is an express aim of the ‘policies and activities’ of the Union.

In the United Kingdom, Directive 2000/78 directly resulted in the [Employment Equality \(Sexual Orientation\) Regulations 2003](#) – the first time sexual orientation was explicitly protected in British employment law (reinforcing the transformative role which EU law has played in enhancing LGBT rights in this country). The directive is now given effect through [the Equality Act 2010](#).

As with ‘gender reassignment’ protections, it is important to understand the historical development of sexual orientation protections within the Equality Act 2010 so as to fully appreciate how leaving the European Union might (negatively) impact LGB workers. Post-Brexit, individuals who experience workplace inequality because of their sexual orientation will continue to enjoy substantial legal protection. Yet, the key question is: to what extent will existing safeguards in UK domestic law be maintained once we withdraw from our current EU obligations. Once again, there is no reasonable fear that, on 31 March 2019, Parliament will sweep away the entire employment equality framework as it applies to gay, lesbian and bisexual persons. On the other hand, however, there is a genuine risk that – if Britain descends into a race-to-the-bottom ‘business compet-

itiveness' culture – LGB employment guarantees will be subtly, but significantly, curtailed. And, without the core baseline obligations of EU law, lesbian, gay and bisexual workers will have few legal avenues for redress.

Of course, one of the striking features of the Equality Act 2010 (building upon the earlier [Equality Act \(Sexual Orientation\) Regulations 2007](#)) is that it extends sexual orientation non-discrimination guarantees to the receipt of services and education. Under [Section 85](#), for example, a secondary school in Manchester would not be able to deny admission to a pupil merely because they are gay, lesbian or bisexual. Similarly, [Section 29](#) would prevent a restaurant owner in Bristol from refusing service to a female couple merely because they are lesbians.

Unlike sexual orientation 'employment' protections, the UK's LGB guarantees in the sphere of services and education are not a consequence of EU intervention. European Union LGB safeguards do not currently extend beyond workplace equality, [although there is currently a proposal for a new equal treatment directive](#), which would expand EU guarantees into spheres, such as services and education. Rather, just like the issue of same-sex marriage (discussed below), sexual orientation rights for entering/enjoying services and education are the result of a domestic political settlement – a decision by the UK Parliament that gay, lesbian and bisexual persons should not experience discrimination when accessing their basic needs. This being the case, however, the potential impact of Brexit on LGB school children, or the lesbian couple dining in the Bristol restaurant, remains unclear.

On the one hand, there is an argument that leaving the European Union will have little effect. Although, both before and after March 2019, Parliament has no obligation to confer protection on LGB recipients of services and education, it has chosen to offer those safeguards. There is no reason why exiting the EU will encourage MPs to withdraw sexual orientation guarantees which were never dependent upon EU membership.

Yet, on the other hand, it would be a mistake to underestimate the influence of the EU project on British culture, especially in terms of fostering openness. There is a fear that, as the UK turns its back on the EU, so too there will be a movement away from the values of tolerance and respect. Within this changed environment, there is genuine potential for amendments to existing sexual orientation non-discrimination rights. On the issue of religious exemptions to LGB equality, for example, which enjoys considerable support in more conservative political quarters, although EU law has never

prohibited the introduction of broad exceptions for service providers who reject LGB clientele, exiting the Union may provide the catalyst for (or encourage) a detrimental change in the law. As, having left the Union, the UK will never be bound by future, more-expansive equality legislation (once it is enacted), there will be little recourse for gay, lesbian and bisexual communities.

## RELATIONSHIP RECOGNITION

One area of LGBT rights where Brexit does not – at least at first glance – appear to have a substantial impact is marriage equality. Although Article 9 of the [Charter of Fundamental Rights of the European Union](#) does not specifically prohibit same-sex marital unions, neither does it require member states to move beyond a traditional (different-sex) definition of marriage.

The passage of the [Marriage \(Same-Sex Couples\) Act 2013](#) – the legislation which currently allows people of the same legal gender to marry in England and Wales – was not a consequence of Britain's membership of the European Union (nor, indeed, was it necessitated by the European Convention on Human Rights which, as currently interpreted, [does not guarantee marriage equality](#) although it increasingly affirms [rights to some form of partnership recognition](#)). Instead, as noted above, same-sex marriage in England, Scotland and Wales ([Northern Ireland remaining conspicuously absent](#)) is the result of a political compromise, whereby politicians in Westminster and Holyrood agreed that, as a matter of English and Scottish policy, it was right that LGB couples should be entitled to enter a civil marriage. What this means, however, is that, when Britain leaves the EU on 31 March 2019, there is – without a fundamental shift in that compromise – unlikely to be serious legislative attempts to exclude same-sex relationships from marital frameworks.

Acknowledging the limited role which the Union has played in UK marriage debates, it would nevertheless be wrong to absolutely disregard the influence which EU law has had in the sphere of relationship recognition.



In a series of landmark cases ([Maruko](#), [Romer](#) and [Hay](#)) from 2008 to 2013, the European Court of Justice significantly limited the extent to which employers and state authorities can distinguish – on questions of work-related pay and benefits – between employees in heterosexual marriages and those in same-sex civil partnerships, in circumstances where same-sex couples cannot marry but where their civil partnership places them in a legally and factually comparable situation to spouses.

In [Hay v Credit Agricole Mutuel](#), for example, the ECJ found that there could be unlawful discrimination based on sexual orientation if an employer reserved certain benefits, such as a bonus, for workers who married, in a situation where workers, who entered a same-sex civil partnership (PACS), did not enjoy these benefits, even though: (a) they were excluded from marriage; (b) the PACS was the only form of legal relationship available in France; and (c) it placed partners in a comparable situation with spouses for the purposes of receiving the benefits. Similarly, in *Romer*, the ECJ held that there could also be no discrimination based on sexual orientation if a pensioner, who has entered into a same-sex registered partnership, receives a lower supplementary retirement pension than an individual, who has entered a heterosexual marriage, where gay couples are excluded from marriage and the pensioner is, for the purposes of the retirement pension, in a comparable situation with a married spouse.

For same-sex couples in the United Kingdom, cases such as *Hay* and *Romer*, were particularly important pre-2014 because, although marital unions were beyond reach, such couples could [enter civil partnerships](#) and, under UK law, that latter institution clearly placed civil partners and spouses in a comparable legal and factual situation for work-related benefits.

Indeed, while EU law has not required the United Kingdom to adopt marriage equality (as the continuing vacuum in Northern Ireland illustrates) the aforementioned case law has assisted (in a 2017 dispute decided by the UK Supreme Court, [Walker v Innospec](#)) to close (perhaps the most gaping) disparity, which continued to exist between different-sex and same-sex couples after the Marriage (Same-Sex Couples) Act 2013.

[Schedule 9, paragraph 18](#) of the Equality Act 2010 provides that ‘a person does not contravene...this Act, so far as relating to sexual orientation, by doing anything which prevents or restricts a person...from having access to a benefit, facility or service... (A) the right to which accrued before 5 December 2005 (the day on which Section 1 of the Civil Partnership Act 2004 came

into force).’ In *Walker*, the appellant, John Walker, had worked for the same company, Innospec Ltd, for a period of 23 years. Until Mr Walker retired in 2003, he had made consistent contributions to the company’s occupational pension scheme. From the early 1990s, Mr Walker had lived with his male partner. The couple entered into a civil union in 2006, and later converted their relationship to a legal marriage.

Despite the longevity of his service, the consistent contributions which he made and the couple’s formalisation of their relationship, Mr Walker was informed that – on the basis of the exemptions set out in Schedule 9, paragraph 18 – Innospec would not pay a full survivors pension should Mr Walker pre-decease his spouse. This was in spite of the fact that, had Mr Walker carried on precisely the same relationship history with a woman (including entering a formal relationship on the same date), Innospec would have honoured the full pension entitlement.

Drawing upon the protection of EU law, the Supreme Court disapplied Schedule 9, paragraph 18, to the extent that it permitted restricted payments (to same-sex spouses) of benefits which accrued prior to December 2005. Such a restriction – grounded in the sexual orientation of the couple – was incompatible with Directive 2000/78 and the general principle of non-discrimination based on sexual orientation.

In the context of Brexit, and looking at the case through the lens of LGBT rights, it is important to understand that – had this litigation been brought in 2022 – Mr Walker and his spouse would have been unlikely to obtain a remedy. In particular, the couple could not have relied upon UK domestic law to further their arguments because, somewhat paradoxically, it was actually the Equality Act 2010 which sanctioned their unequal treatment. The case is a stark reminder of both the existing protection (and possible future protections) of which LGBT Britons will be deprived through the Brexit process.

In recent months, this deprivation has been re-emphasised by [Advocate General Bobek](#)’s recommendation – in [MB v Secretary of State for Work and Pensions](#) – that the UK government’s historical withholding of an earlier retirement pension, from a transgender woman who refused to annul her marriage to a cisgender female spouse (thus forfeiting her right to obtain a Gender Recognition Certificate under the original terms of the Gender Recognition Act 2004) constitutes impermissible direct discrimination on the basis of sex. The Advocate General’s opinion is particularly significant because, under the European Convention of Human

Rights (which is the human rights structure upon which LGBT individuals will have to rely post-Brexit), a similar divorce requirement (in [Finland](#)) has been upheld as a proportionate interference with private and family life.

## ASYLUM LAW

One final issue to consider is the potentially negative impact which Brexit will have upon LGBT individuals who navigate the UK's complex asylum application procedures. In [HJ \(Iran\) and HT \(Cameroon\) v Secretary of State for the Home Department](#), the UK Supreme Court declared that the British government cannot deport gay, lesbian and bisexual asylum applicants to their country of origin if the only way those individuals will avoid persecution is suppressing their sexual orientation. The judgment in HJ and HT recognises sexuality as an inherent aspect of self, and acknowledges that gay, lesbian and bisexual persons should not have to hide their identity to enjoy core, fundamental rights.

HJ and HT was largely welcomed by LGBT immigration advocates and, indeed, its reasoning was followed by the European Court of Justice when that court confronted a similar issue in [X, Y and Z v Minister voor Immigratie en Asiel](#). However, while the decision creates stronger protections for individuals who can prove a well-founded fear of persecution based on sexual orientation, it also encouraged stricter controls on the issue of 'credibility'. While border authorities are now more willing to embrace persons whose LGB identity they accept, they have also instituted more rigorous assessment processes, applying stringent burdens on those who express a gay, lesbian and bisexual orientation.

The introduction of stricter 'credibility' tests surrounding sexual orientation has resulted in allegations of troubling rights violations. Stories of applicants being asked improper questions, using context-inappropriate terminology, and of applicants feeling compelled to provide highly-sensitive personal materials (including explicit photographs) became widespread in the media and in academic reports.

In recent years, however, the European Court of Justice has taken significant steps to counteract the imposition of unfair, undignified and inappropriate credibility tests. In [A, B and C v Staatssecretaris van Veiligheid en Justi-](#)

[tie](#), the Court held that, under EU law, LGB-identified individuals cannot be asked sexually explicit questions by immigration officials, who must also refuse to accept intimate evidence (sexual photos, videos, etc.) which applicants may offer. Having regard to the difficulty which some people may confront in externalising their sexual orientation, the ECJ has made clear that member states cannot absolutely reject credibility where there is a failure to disclose LGB status at the first available opportunity. In the recent case of [F v Bevándorlási és Állampolgársági Hivatal](#), the Luxembourg judges have limited the extent to which national authorities can use expert evidence to determine sexual orientation.

While none of the ECJ cases have specifically addressed the United Kingdom, the judgments have great importance for practice in this country. That fact is particularly so considering that the European Court of Human Rights [has taken a strikingly more conservative, and less interventionist](#), approach to LGB applications. Decisions, such as A, B and C are regularly pleaded, and must be enforced, by UK authorities. The reasoning of the Luxembourg judges is now evident in the Home Office's guidance: [Asylum Policy Instruction: Sexual Orientation in Asylum Claims](#), which was circulated in August 2016. However, perhaps more than anything else, ECJ supervision creates a minimum floor of protection which, although not eradicating the many problems which LGBT applicants experience in the UK asylum framework, at least establishes core guarantees towards which immigration authorities must aspire. Leaving the European Union – particularly within a resurgent climate of anti-migration – there is a risk that the plight of LGBT asylum applicants (and the structural indignities they confront) will only be reinforced in post-Brexit Britain.

## CHARTER OF FUNDAMENTAL RIGHTS

### OF THE EUROPEAN UNION

In recent years, the Court of Justice of the European Union has increasingly applied the [Charter of Fundamental Rights](#) to the legal concerns of LGBT persons. This evolving trend in protecting sexual orientation and gender identity rights highlights the significant loss

which LGBT Britons will experience if – as currently expected – the UK fails to retain Charter guarantees post-Brexit.

Throughout this report, there has already been frequent reference to landmark cases in which the CJEU has applied Charter protections to LGBT populations. Use of the Charter has been particularly striking in the sphere of asylum law. In [X, Y and Z v Minister voor Immigratie en Asiel](#), the Luxembourg judges held that imprisoning individuals for engaging in homosexual activities could constitute an act of persecution within the meaning of Article 9(1) of the [Qualification Directive](#). Such imprisonment would violate [Article 8 ECHR](#) (to which Article 7 of the Charter corresponds) and would be a ‘punishment which is disproportionate and discriminatory within the meaning of Article 9(2)(c) of the Directive.’ This opens asylum in the EU for LGBTI people from those countries.

In the subsequent judgment, [A, B and C v Staatssecretaris van Veiligheid en Justitie](#), the European Court of Justice stated that, while national immigration authorities can make enquiries to ‘determine the facts and circumstances as regards the declared sexual orientation of an applicant for asylum’, those officials violate Article 7 of the Charter by posing questions on the sexual

practices in which applicants engage. Similarly, allowing applicants to submit to homosexuality ‘tests’ or to produce evidence of intimate acts is incompatible with human dignity, as enshrined in Article 1 of the Charter.

In the recent decision, [F v Bevándorlási és Állampolgársági Hivatal](#), the ECJ stated that Article 4 of [Directive 2011/95](#), read in the light of Article 7 of the Charter, prohibits using psychologists’ reports (based on projective personality testing) to determine the veracity of sexual orientation where an individual applies for sexual orientation.

The CJEU has also applied the Charter to LGBT issues outside immigration and asylum law. In [Leger](#) – which concerned the permissibility of France’s lifetime ban on blood donations from men-who-have-sex-with-men – the Court held that the French law (by focusing on the homosexual conduct of gay men) may ‘discriminate against homosexuals on grounds of sexual orientation within the meaning of Article 21(1) of the Charter.’ On the question of whether such a ban can be proportionate ([Article 52\(1\) of the Charter](#)), the Luxembourg judges observed there may be alternative (less onerous) mechanisms for ensuring a ‘a high level of health protection to recipients’ which would render a lifetime ban unnecessary.

# RECOMMENDATIONS

## The UK Government and Parliament should:

1. Recognize there are particular impacts on LGBT people of leaving the EU and ensure these negative effects are minimized.
2. Reconsider retaining membership of the Single Market, which contains significant benefits for LGBTI and other citizens, and without which it will be easier for LGBTI rights to be undermined in future.
3. Acknowledge that LGBTI people may be more likely to exercise their EU freedom of movement rights, including by having a partner from elsewhere in the EU. And therefore work with the EU to minimize any obstructions to freedom of movement, including the recognition of LGBTI partners and families.
4. Retain the EU Charter of Fundamental Rights.
5. If the Charter cannot be retained, the prohibition of discrimination on the grounds of sexual orientation in relation to retained EU law must be expressly stated in UK law.
6. Undertake to hold a second referendum on the terms of the Brexit deal, including the option to remain in the EU, to allow LGBTI citizens and others to make an informed choice once the full facts and final deal are known.
7. Ensure all future trade deals respect LGBT equality.
8. Recognise that the EU currently provides the highest possible protections in international law for LGBT people and, if Britain is to leave, ensure that the UK continues to drive forward higher standards in LGBTI equality in future.
9. Recognise the EU provides a framework where the UK contributes positively to LGBTI rights in Europe and beyond. Further recognise the UK has a particular responsibility to further LGBTI equality internationally. Therefore, if the UK exits the EU, it must create strategic partnerships with other LGBTI-positive countries to continue to promote decriminalisation, equality, freedom and protection worldwide.

## Businesses/ organisations should consider:

1. Lobbying government to ensure the UK does not descend into a race-to-the-bottom 'business competitiveness' culture in which LGBTI employment or consumer protections are reduced or curtailed.
2. Incorporating non-discrimination protections into their own policies to provide an alternative framework for protection, should a future UK government undermine protections for LGBTI post Brexit.
3. Affirming the importance of LGBTI inclusion in terms of performance and competitiveness, particularly where that may come under attack.
4. Review any LGBTI employee or customer policies and procedures which may be impacted by Brexit, and mitigate against negative consequences in so far as is possible.

## Individuals should consider:

1. Writing to your MP to solicit their help in ensuring the level of protection LGBT people have now as EU members is not diminished by leaving the EU.
2. If in a civil partnership, investigate whether the –final Brexit deal has an impact on the recognition of that partnership in EU member states and consider using the existing framework to change the partnership status to marriage if that gives greater protection.
3. Where you can apply for citizenship of another EU country, for example through dual nationality or if you have an EU citizen as a partner, consider applying for a passport to that state to retain the benefits of EU citizenship.

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